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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 766.

EDWARD K. BARSKY, ET AL., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF OF NATIONAL LAWYERS GUILD AS AMICUS CURIAE.

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The National Lawyers Guild is an organization of members of the bar, devoted among other things to the protection of our democratic institutions and the civil rights and liberties of all the people. It believes that the denial of certiorari in this case would leave unreviewed a decision which makes a vital departure from the constitutional principles established by this Court, and would destroy protection heretofore afforded by the Constitution to our basic democratic institutions and the civil rights and liberties of all the people. For these reasons, it has secured the consent of the parties to the filing of this brief, as amicus curiae.

I.

The Present Case Presents Novel Issues of Tremendous Significance Both Nationally, and Throughout the World.

This case involves the most significant issue whether freedom of speech, press, assembly and personal liberty shall be maintained as a vital force in our national life, and as an example to other nations. The deep inroad upon these freedoms, of the decision below, was clearly set out in the dissent of Justice Edgerton:

> That the Committee's investigation does in fact restrict speech is too clear for dispute. The prosecution does not deny it and the court concedes it. The effect is not limited to the people whom the Committee stigmatizes or calls before it, but extends to others who hold similar views and to still others who might be disposed to adopt them. It is not prudent to hold views or to join groups that the Committee has condemned. People have grown wary of expressing any unorthodox opinions. No one can measure the inroad the Committee has made in the American sense of freedom to speak.

The President's Committee on Civil Rights has recently reported that public excitement about "Communists" has engendered "a state of near-hysteria" which "threatens to inhibit the freedom of genuine democrats". *To Secure These Rights,* (1947) 49. More than any other single agency or group, the House Committee on Un-American Activities has contributed to this near-hysteria. The distorting "exposures" of the Committee have imperiled the survival of virtually every organization with liberal political and economic aims.

The hysteria resulting from the continuous campaign of the House Committee designed to create the belief that individuals or organizations not conforming with its concept of orthodoxy are "un-American" and hence "disloyal," has made rapid strides in recent months. We have seen and are continuing to see the necessary consequences

of such a campaign. The concept that government officials can prescribe orthodoxy and compel conformity is rapidly becoming the accepted fashion. It has spread to the executive department,[1] to state legislative committees, and even local law enforcement agencies. It has invaded our trade unions, our educational institutions, and our civic organizations. Individuals or organizations that have received the brand of "un-American" or "subversive" are denied access to audiences, and refused meeting places in public schools and auditoriums and in private meeting halls and hotels. And as a final and inevitable sequel, their meetings are attacked and broken up by violence, their leaders are assaulted and beaten. The pattern of violence against the expression of ideas which occurred against the abolitionists in the pre-Civil War period, the socialists and radicals in 1919 and the early 1920's, is being repeated today against those the House Committee labels as "un-American". The pattern has so far progressed that we can find the Chief of police of our fifth largest city stating:

> Teddy Roosevelt would turn over in his grave were he to know that such un-American activities and such an un-American leader as that of Wallace are now being supported by the Progressive Party of Michigan. . . .
>
> I have no doubt that you object to statements that were made by me, especially when I said that all those engaged in un-American Activities ought to be either shot, thrown out of the country, or put in jail.[2]

This trend was commented upon in a letter sent by twenty-two members of the faculty of Yale University Law School, on November 26, 1947, to the President of the United States, the Secretary of State, and the Speaker of the House of Representatives. The letter reads in part:

> . . . There are alarming signs that persecution for opinion, if not curbed, may reach a point never hither-

[1] Executive Order 9835, and the actions of the Attorney General implementing it.

[2] New Republic, April 5, 1948, at p. 8.

> to attained even in the darkest periods of our history. With it, we may expect racial, religious and every other kind of bigotry which, if it is to run its full course, can loose such a flood of intolerance as utterly to destroy the civil liberties without which no democratic society can survive.
>
> A pattern of suppression is today evolving at the highest levels of the Federal Government. The more alarming aspects of the situation include the President's Loyalty Order of last spring, the recent "Statement of Security Principles" by the Department of State and the current performance of the Un-American Activities Committee of the House of Representatives . . .
>
> . . . Under the cloak of congressional immunity or the cloak of anonymity, high officials of the national Government are today acting in disregard and in defiance of the American tradition of civil liberties and, in our considered judgment, in violation of the Constitution of the United States.[3]

The effect of the Committee's activities reaches beyond the organizations and individuals condemned as "un-American" by the Committee. The same threat hangs over others through the fear that they may receive the same treatment. As they observe the effect on organizations and individuals condemned by the Committee, other organizations will necessarily adopt a cautious and "go slow" policy. They will hesitate to criticize the government, or take views on political or economic matters at variance with those held by the House Committee. Thus, debate and discussion on the most vital political and economic issues can no longer be free and unfettered. Words must be watched and weighed. Ideas can be urged and positions taken not solely on the basis of conviction or reason. It is now necessary to consider also whether these ideas and positions will meet with the approval of the House Committee.

But the effectiveness of our democracy lies in the freedom of our people to organize voluntarily into associations,

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[3] Quoted in part in New York Times, November 27, 1947, p. 38.

whether religious, political or economic, and in such organizations freely, without any governmental restraint, to discuss economic, political or social problems, and to present to governmental authorities and the people, their views on any and every subject. *Thomas* v. *Collins,* 323 U. S. 516; *U. S.* v. *Cruikshank,* 92 U. S. 542; *DeJonge* v. *Oregon,* 299 U. S. 353; *Hague* v. *CIO,* 307 U. S. 496. Self-government can succeed only where the people have full opportunity to hear and discuss all shades of opinion, all proposals for change or reform in our economic, social or political system. *To Secure These Rights,* p. 47; *The Constitutional Right to Advocate Political, Social and Economic Change,* Vol. VII, No. 2, Lawyers Guild Review, 57. This freedom to organize, this opportunity to hear and discuss, are the very things the Committee has set itself up to restrain and suppress. The activities of the Committee, upheld by the decision below, have not only met with the resounding condemnation of many of the foremost public citizens in our country,[4] but have evoked the comment abroad that our country, the birthplace and the shrine of freedom and liberty, today enjoys less freedom and liberty than exists in European countries.[5]

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[4] For a few examples see *Hollywood on Trial,* supra, pp. 135-151, 215-226. The conservative New York Herald Tribune said of the Committee: " . . . the beliefs of men and women who write for the screen are, like the beliefs of any ordinary men or women, nobody's business but their own, as the Bill of Rights mentions. . . . Neither Mr. Thomas nor the Congress in which he sits is empowered to dictate what Americans shall think." From editorial of October 22, 1947. And the Chicago Times said: "Of course the real object . . . is to smear New Dealers and whatever their progressive successions may be called." From editorial of October 22, 1947.

[5] Editorial, Washington Post, April 29, 1948, entitled "As others See Us." According to an Associated Press London dispatch, "Newspapers of the left, center, and right alike used such terms as 'Hollywood witch hunt,' 'nauseating spectacle,' and 'antics of a circus load of film stars' " to describe the Committee's investigation of Hollywood. P. M., October 27, 1947, p. 3. The Observer of London, in an editorial entitled "Star Chamber" commented: "Why then, should Americans in the film industry not enjoy that

Perhaps the most eloquent of such comments has been made by Dr. Thomas Mann, who, like other Europeans, sought refuge in this country from political tyranny and remained to contribute to and enrich our society:[6]

> I testify, moreover, that to my mind the ignorant and superstitious persecution of the believers in a political and economic doctrine which is, after all the creation of great minds and great thinkers—I testify that this persecution is not only degrading for the persecutors themselves but also very harmful to the cultural reputation of this country. As an American citizen of German birth, I finally testify that I am painfully familiar with certain political trends. Spiritual intolerance, political inquisitions, and declining legal security, and all this in the name of an alleged "state of emergency" . . . that is how it started in Germany. What followed was fascism and what followed fascism was war.[7]

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freedom of thought guaranteed by the Constitution? . . . it would be a poor bargain to keep the atom secrets and lose those freedoms which are the secret of America's greatness." October 26, 1947, p. 4. Don Iddons Diary in the Sunday Mail of Brisbane, Australia, has this to say: "I have no time for Communism, but consider that this investigation is a witch hunt, a Donnybrook Fair, and a high-pressure farce." November 2, 1947.

[6] Cf. Statement by Federal Communications Commissioner Clifford J. Durr before Federation of Atomic Scientists, in commenting on attacks by the Committee on Dr. Edward Condon, Director of the Bureau of Standards: "Because of repression in Europe the United States gained Einstein, Szilard and Fermi," quoted on page 1, of Washington Post, May 1, 1948.

[7] Foreword to *Hollywood on Trial, supra.* Cf. The Statement of the House of Bishops of the Protestant Episcopal Church in the United States with regard to the practices of this committee: "an inquisitorial investigation of men's personal beliefs is a threat to freedom of conscience." (New York Herald Tribune, November 8, 1947, p. 4.)

II.

The Decision Below is in Conflict With Constitutional Principles Established by this Court.

(1) *The decision below repudiates the "clear and present danger" doctrine.*

The majority of the Court below stated frankly that the legislation establishing the Committee and the actions of the Committee constituted an infringement upon the free speech of petitioners and others. It nevertheless upheld the Committee's power, admittedly in the absence of any showing of a clear and present danger, on the ground that Congress has power to inquire into "threats to the existing form of government by extra-constitutional processes of change." The Court below said that the clear and present danger doctrine did not apply since the statute here involved, authorized a legislative inquiry, and did not, as in other cases, involve a direct restriction upon speech or publication. But "The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws." Stone J. in *Jones* v. *Opelika*, 316 U. S. 584, 609. In the same vein, is the statement of Justice Jackson concurring in *Thomas* v. *Collins*, 323 U. S. 516, 546:

> It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control.

Thus, the protection of the First Amendment applies to all, not some, legislative acts. And this Court has held that the First Amendment prohibits the regulation or restriction of expression unless the words used are used in such circumstances and are of such a nature as to create a "clear and present danger" of an "extremely serious"

substantive harm which Congress may directly prevent. *Bridges* v. *California*, 314 U. S. 252; *Thornhill* v. *Alabama*, 310 U. S. 88; *DeJonge* v. *Oregon*, 299 U. S. 353; *Near* v. *Minnesota*, 283 U. S. 697; *Schenck* v. *United States*, 249 U. S. 47. The doctrine of the Court below, if sanctioned, would justify any infringment of the rights guaranteed by the First Amendment, on the ground that such an infringement was an indirect one, and on the mere assertion that the action taken was desirable to protect the government. But the protection of the First Amendment, already limited by the clear and present danger doctrine, is not to be abandoned because the repression is indirect rather than direct. The Bill of Rights cannot be circumvented by use of indirection. Cf. *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *United States* v. *Lovett*, 328 U. S. 303.

(2) *The decision repudiates the doctrine of this Court that, in the field of free speech, a statute invalid on its face because of vagueness cannot be saved by a narrowing judicial construction.*

The majority of the Court below apparently conceded that one portion of the resolution, that dealing with the investigation of "un-American propaganda activities" was fatally vague, but by some ledgerdemain determined that the present inquiry was not conducted under this portion of the resolution, but under another. The Court sustained another, and equally vague portion of the resolution ("subversive and un-American propaganda that . . . attacks the principle of the form of government as guaranteed by our Constitution") on the ground, apparently, that Congress has power to inquire into "threats to the existing form of government by extra-constitutional processes of change." But the resolution says nothing about "threats to the existing form of government by extra-constitutional processes of change" and no such inquiry was involved in the present case. The resolution, on the contrary, is without limits and

has been utilized to intimidate and injure any and every movement for economic or social reform.

The Court's effort to save the statute by brushing aside one portion of the resolution, which it concedes to be fatally vague, and rewriting another portion with complete violence to the actual language of the resolution itself, is the grossest kind of judicial legislation.

This Court has held that a statute so vague as to be invalid on its face cannot be rewritten by a Court, since an attempted saving construction would usurp the legislative function. *United States* v. *Rease*, 92 U. S. 214, 221. This principle is particularly to be applied in the field protected by the First Amendment, since the very generality of the resolution offends the protections guaranteed by the Amendment. If the statute because of its vagueness or breadth can be applied to cover constitutionally protected activities, the Court cannot uphold it as applied to non-constitutionally protected activities. *Winters* v. *State of New York*, decided March 29, 1948; *Thornhill* v. *Alabama*, 310 U. S. 88, 97; *Stromberg* v. *California*, 283 U. S. 359, 369, 370; cf. *Jones* v. *S. E. C.*, 298 U. S. 1, 27.

(3) *The decision below sustains the Committee's practice of exposure and blacklist, a power beyond the limits of Congressional authority established by decisions of this Court.*

It is obvious from the record of this Committee that it is not a committee of inquiry but a committee which utilizes its power to compel conformity under threat of blacklisting and exposure. And it sets itself up to mold public opinion in conformity with the Committee's notion of right and wrong, of orthodoxy and unorthodoxy. This is clearly demonstrated by accepted methods of legislative interpretation.[8] From the legislative debates and acts and the prac-

[8] "In passing upon constitutional questions . . . the statute must be tested by its operation and effect." *Near* v. *Minnesota*, 283 U. S. 697, 711.

tices of the Committee,[9] Justice Edgerton concluded: "The case is as if the enabling Act read 'The Committee shall expose unorthodox propaganda in order to restrain and punish it' ". But no governmental authority "can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." . . . "authority . . . is to be controlled by public opinion, not public opinion by authority." *Bd. of Education* v. *Barnette,* 319 U. S. 624, 641, 642.

> "The very purpose of the First Amendment is to preclude public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas* v. *Collins,* 323 U. S. 511, 545.

No enumerated power of Congress gives an authority to "expose", to censor opinion and expression, or to blacklist individuals for political and economic views. Hence the Committee's authority violates the Ninth and Tenth Amendments. *Kilbourn* v. *Thompson,* 103, U. S. 168; *McGrain* v. *Daugherty,* 273 U. S. 135; *Jurney* v. *MacCracken,* 294 U. S. 125; *Sinclair* v. *United States,* 279 U. S. 263; cf. *Marshall* v. *Gordon,* 243 U. S. 521.

(4) *The Committee's authority violates the Fourth Amendment as it has been interpreted by the Court.*

The availability and use of process to compel testimony, without adequate foreknown standards for the inquiry, violates the Fourth Amendment's prohibition of unreasonable searches and seizures. *Jones* v. *S. E. C.,* 298 U. S. 1, 25, 26, 27, 28. The use of such vague words as "un-American"

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[9] Note, Constitutional Limitations on the Un-American Activities Committee, 47 Col. L. Rev., 416; Kahn, "Hollywood on Trial" (1948, Boni and Gaer. See also material set out in footnotes 13 to 21 of Justice Edgerton's dissent.)

and "subversive" places no bounds on the Committee's scope and the reach of its subpoena, except the Committee's whim and caprice. The compulsion of testimony authorized by the resolution is limited only by the Committee's unbridled discretion.

This Committee's authority and conduct fall squarely within the constitutional prohibition described in *Re Pacific R. Commission*, 32 F. 241, from which the following passage (at 263) was quoted with approval in the *Jones* case, *supra* (at 27):

> A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing where the practice under it could end.

Conclusion.

Since long past this Court has asserted its power to review the validity of legislative and executive actions. With the power has come a responsibility, "the duty our system places on this Court to say where the individual's freedom ends and the State's power begins." *Thomas* v. *Collins*, 323 U. S. 516, 529. The obligation on this Court to protect the guarantees of the First Amendment is of the highest order. *Board of Education* v. *Barnette*, 319 U. S. 624, 640. The Court has "no higher duty, no more solemn responsibility" than "that of translating into living law and maintaining this constitutional shield" of the Bill of Rights. *Chambers* v. *Florida*, 309 U. S. 227, 241. Judicial review, it has assured us, will protect individuals from legal assertions of Congress' privilege of inquiry. *Jurney* v. *MacCracken*, 294 U. S. 125, 150. Nor is the size of judicial re-

view any narrower where the encroachment upon the Bill of Rights is indirect rather than direct.[10]

We ask the Court in this, "one of the more momentous"[11] issues ever to come before it, to discharge this duty and to redeem its pledge. In this we are joined, we are confident, by many millions of citizens who, like Justice Edgerton dissenting below, "hope the last word has not been said on the question" of the legality of the Committee's inquest into political and economic views.

The responsibilities of judicial review place upon this Court the heavy burden of insuring that no Act of Congress or the Executive can deny the fundamental liberties guaranteed by the Bill of Rights. This Court is the last remaining Constitutional protection against these assaults upon civil liberties. To permit the Resolution creating the House Committee and its activities, which constitutes so potent an attack against the exercise of these fundamental rights, to remain unreviewed, would be to abdicate this responsibility and to nullify the concept of judicial review.

Respectfully submitted,

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[10] See Jackson, J. convening in *Thomas* v. *Collins, supra*, at p. 547: "If this Court was not or does not in proper cases inquire whether speech or publication is properly condemned by association, its claim to guardianship of free speech and press is but a hollow one."

[11] Judge Clark dissenting in *Josephson* v. *United States*, 165 F. (2d) 93 (C. C. A. 2, 1947).